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IN THE

Supreme Court of the United States

OCTOBER TERM

No. 964

LAWRENCE CAPITOL INC., *Petitioner*,

v.

STANLEY-WARNER CORPORATION
WARNER BROS. THEATRES, INC.
WARNER BROS. CIRCUIT MANAGEMENT CORPORATION
STANLEY-WARNER CIRCUIT MANAGEMENT CORPORATION
WARNER BROS. PICTURES, INC.
WARNER BROS. PICTURES DISTRIBUTING CORPORATION
TWENTIETH CENTURY-FOX FILM CORPORATION
TCF FILM CORPORATION
LOEW'S INCORPORATED
PARAMOUNT FILM DISTRIBUTING CORPORATION
PARAMOUNT PICTURES CORPORATION
RKO PICTURES, INC.
COLUMBIA PICTURES CORPORATION
UNIVERSAL FILM EXCHANGES, INC.
UNITED ARTISTS CORPORATION
REPUBLIC PICTURES CORPORATION
MASSACHUSETTS AMUSEMENT CORPORATION
EMPIRE AMUSEMENT CO., INC.
BROADWAY THEATRE CO., INC.
ESSEX SAVINGS BANK OF LAWRENCE
ROLAND SISKIND
HAROLD SISKIND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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March 1963

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Lawrence Capitol, Inc., prays that a writ of certiorari issue to review the judgment entered in this case on January 3, 1963, by the United States Court of Appeals for the First Circuit.

OPINION BELOW

No oral or written opinion was announced by the court of appeals.

JURISDICTION OF THE SUPREME COURT

The date and time of entry of the judgment to be reviewed was January 3, 1963.

The statutory provisions believed to confer on the Supreme Court jurisdiction to review the judgment, are Title 28, U. S. C., section 1254(1), and section 2101.

QUESTIONS PRESENTED FOR REVIEW

1. Is it within the discretion of the court of appeals to dismiss a timely appeal from an adverse judgment on the merits in a private suit under the antitrust laws, without a hearing and decision on the merits?

2. Under a rule requiring an appellant to furnish within ten days after filing the record, a statement of the parts which it deems "essential" for the judges to read and to print such parts in an appendix to its brief—is it within the discretion of the court of appeals to so dismiss such an appeal, because of the failure to furnish, within the ten days, a statement of excerpts from the record which appellant puts in an appendix to its brief but does not deem "essential" for the judges to read, which are not in fact essential for reading, are placed in the appendix merely for convenience, and where no detriment results to appellees and the court?

3. Does such dismissal constitute due process of law?

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS

Constitution of the United States:

> No person shall . . . be deprived of life, liberty, or property without due process of law; . . . (Amendments, Article V, U. S. Code Vol. One, page xlvi, 1958 edition.

Rules of the United States Court of Appeals for the First Circuit:

> Rule 24(1) Record Appendices to Briefs. The appellant or petitioner shall print as an appendix to his brief (which appendix may be bound separately) the relevant docket entries below arranged chronologically in a single column, any relevant charge or opinion of the court, agency, board, commission or officer below, the judgment, decree, order, or decision appealed from or sought to be reviewed or enforced, and such other parts of the record, material to the questions presented, as the appellant or petitioner deems it essential for the judges of the court to read in order to decide those questions.
>
> . . . . . .
>
> (2) Requirements of Appellant or Petitioner. The appellant or petitioner, within ten days after filing the record on appeal or review in the clerk's office, shall furnish appellee or respondent, and the clerk of this court, with a statement of the parts of the record he proposes to print in the appendix to his brief pursuant to this rule. At the same time he shall likewise furnish a statement of points upon which he intends to rely (like the statement of questions involved in (3)(b) of this rule), if the same is not already set forth in the record on appeal or review.
>
> . . . . . .
>
> (8) Filing. Within thirty days after the record on appeal or review is filed with the clerk of this court the appellant or petitioner shall file twenty-five copies of his printed brief and appendix thereto with proof of service of three copies upon counsel for each adverse interest.

STATEMENT OF THE CASE

On July 6, 1962, petitioner filed notices of appeal to the United States Court of Appeals for the First Circuit from judgments of the United States District Court for the District of Massachusetts, dismissing two treble damage antitrust actions of petitioner against respondents, which had been consolidated and tried together before a jury. The judgments were based on verdicts directed by the trial court at the close of petitioner's evidence.

The complaints charged respondents with engaging in a conspiracy to restrain and monopolize trade in motion pictures, especially for exhibition on first run in theatres at Lawrence, Mass. Petitioner operated one, and respondents three first run theatres at Lawrence. Petitioner was compelled to close its theatre and business in December 1954, because of inability to obtain pictures, which it charged resulted from the conspiracy of respondents. The case is a classical instance of the statement in *United States* v. *Paramount*, 334 U.S. 131, 162, "It is largely out of the ruins of the small operators that the large empires of exhibitors have been built."

The case in the court of appeals presented new, unusual and important questions of trial procedure, monopoly fact and antitrust law in suits by private parties. This petition does not, however, seek to have this Court review any of these questions, because the court of appeals has not heard or decided them. Petitioner asks this Court to review the action of that court in dismissing the appeals on a procedural formality relative to the filing of petitioner's brief.

The record was filed in the court of appeals on October 15, 1962.

The rules of the court required that an appellant should print as an appendix to its brief: (1) docket entires below; (2) any relevant charge or opinion of the court below; (3) the judgment; and (4) such other parts of the record as appellant deems essential for the judges to read. The rules provide that within ten days after filing the record, appellant should furnish to the clerk and appellees statements of the parts of the record which it proposed to print in the appendix, and of the points on which it intended to rely.

Petitioner filed with the clerk and served on respondents the statement of the points of reliance. It has never filed or served any statement of any parts of the record which it considered "essential" for the judges to read, because it has not deemed any part of the record so "essential".

The rules of the court also provided for filing appellant's brief within thirty days after filing the record. On October 25, 1962, the time for filing petitioner's brief was extended to December 31, 1962. (R. 3) On December 26, 1962, petitioner moved for another extension until January 31, 1963, because of inability to meet the December 31 deadline. (R. 7) Respondents made no opposition to this, but requested that the extension be granted on condition that petitioner furnish before January 7, 1963, a statement of the parts of the record to be printed, and that respondents be allowed until March 22, 1963, for filing their briefs.

On January 3, 1963, the court entered an order dismissing the appeals for "want of diligent prosecution." (R. 10)

Petitioner moved for reconsideration, to vacate the order and to reinstate the appeals, and to receive a brief and appendix which it attached to the motion. (R. 11) The motion was supported by affidavits explaining the delay and need for time.

Respondents filed oppositions to this motion, copies of which were received by petitioner on January 23, 1963. (R. 20, 27) Petitioner prepared a reply to the oppositions and at 9:20 a.m. on January 24 its president called the clerk on the telephone from Lawrence, and informed him that petitioner desired to file the reply, and would bring it to Boston on the following day for that purpose. On the same day, however, the order denying petitioner's motion for reconsideration etc. was issued. (R. 31) The court also at the same time directed that its mandate to the District Court on the order of dismissal of the appeals be issued forthwith. The mandate was accordingly issued on the same day. (R. 31)

Petitioner's reply and motion were served on respondents and tendered at the office of the clerk on January 25, 1963, but were refused. Petitioner then lodged the reply and motion with the court by mailing them to the clerk on January 25, 1963. Petitioner also moved the court for

recall of the mandate, but the motion was denied on February 7, 1963. (R. 32, 33) Thus petitioner's effort to resuscitate the appeals ended in failure.

The elapsed time from the filing of the record to the time of dismissal was 80 days, or on the third day after expiration of the extension allowed to petitioner.

Petitioner's necessity and reason for the second extension of time made in the motion of December 26, 1963, were succinctly stated as follows in an affidavit supporting its motion (R. 13):

> Russell Hardy, sr., being sworn, states as follows:
>
> I have prepared the brief for the appellant in these two cases on appeal. Because of the total lack of money, Lawrence Capitol Inc., as yet, has been unable to pay for my services. For the same reason it has been unable to furnish any money to obtain assistance in the preparation of the brief for me, and I have been compelled to prepare the brief in every respect virtually singlehandedly. Lack of money and great difficulty in obtaining credit has also greatly delayed Lawrence Capitol Inc. in procuring the necessary materials for prosecuting the appeals, as the transcript of trial, exhibits, etc. This poverty, which was copiously proved on cross-examination of appellant's chief witness (Tr. 1067-1139), is the result of the conduct of the appellees of which complaint is made in this case.
>
> The appeal was taken on July 6, 1962, but, because of lack of money, it was not until October that the appellant was able to procure and furnish the transcript of the trial, the numerous exhibits, and the record of other proceedings, for my use in preparation of the brief.
>
> The transcript of the trial and other proceedings is more than 1,500 pages, and the number of exhibits is more than 190. A number of the exhibits are long and complicated legal documents, requiring careful study and analysis for clear presentation in the brief.
>
> After receiving this material, it was first necessary for me to carefully read, study and make a written

digest and index of all of it. Otherwise the task of producing the brief would have been very difficult and greatly wasteful of time. On this part of the work I spent approximately 80 percent of my time until completion of the digest and index; although I was at the task on every day, including all of the Saturdays, Sundays and holidays, until well into November 1962.

Thereafter until completion of the brief proper, in final typewritten form, on January 11 at 9 p.m., the work occupied more than 90 percent of my time, including, as before, Saturdays, Sundays, Christmas Eve, Christmas Day, New Year's Eve and New Years Day.

As the brief discloses, the case involves unusually complex and unusually important economic and legal questions, on which even under more favorable conditions few if any attorneys could have produced an adequate brief in less time than I have used.

The financial disability of petitioner was more specifically stated in an affidavit of its president, also supporting the motion. (R. 15)

JURISDICTION OF THE COURT OF APPEALS

The court of appeals has jurisdiction of appeals from the judgments of the District Court under Title 28, section 1291, United States Code Judiciary and Judicial Procedure.

ARGUMENT

The Dismissal of the Appeals Deprived Petitioner of Due Process of Law

Petitioner has been deprived of its right to a hearing and determination of its appeals for a default which did not actually exist. If, however, petitioner was actually at fault, the severe punishment of dismissal of the appeals was out of all proportion to the delinquency taken as its fullest possible measure. For the fault of petitioner, if any, the punishment imposed has been the death sentence of its appeals.

The purpose of the ten day requirement would seem to be entirely for the benefit of appellees, to afford them at the earliest stage of the appeal information of the parts of the record on which appellant will most heavily rely, to aid appellees in the preparation of their briefs. As the rules require that the appendix also contain the docket entries, the opinion and judgment, any statement from an appellant informing them that these items would appear in an appendix, would merely inform appellees of what they already know.

Although petitioner added an appendix to its brief, containing three excerpts from the record, covering about five pages, it did not do so because the material was considered "essential" for the judges to read. The first excerpt was a statement by the trial judge of a rule of law, and the second a statement to the jury of his reasons for directing the verdicts. As the reasons given by a trial judge for his action and rulings, right or wrong, are not controlling on appeal, it was not essential that they should be read by the judges. The third excerpt was a small part of an exhibit which had been excluded from evidence, the findings of fact in the *Paramount Case*, 331 U.S. 131. Reference to the text of the brief will show that the same subjects were correctly and sufficiently described therein, and that the excerpts would merely serve the *convenience* of any judge who might desire more specific information.

While the facts shown in the excerpts are important and illustrative, they relate to no disputed question, and nothing turns upon any peculiar language in any of them. Nowhere in petitioner's brief were the judges referred to the excerpts as essential for reading or otherwise.

The rule does not bar an appellant from printing in an appendix to his brief, any part of the record which he *does not* deem essential for reading, nor require him to furnish a statement thereof within ten days or at any time prior to filing his brief.

Assuming, however, that the excerpts were "essential" for reading, any possible detriment to respondents or the court by delay or lack of diligence, was prevented or cured when the brief with the excerpts was tendered to the court and served on respondents on January 26, 1963.

Although in their oppositions respondents complained generally and copiously of petitioner, the only specific charge made of any "want of diligent prosecution" was the failure to designate "essential" reading. They made no claim whatever that any detriment had been or would be suffered by them or the court from the failure.

Respondents admitted in these oppositions that petitioner's lack of money was the cause of the delay. They stated: "these appellees accept as true the statement that the appellant has been handicapped by lack of funds in the prosecution of its appeal and in printing their brief and record appendix. They assert that fact (which is the only basic fact set forth in the affidavit in support of the present motion) is completely irrelevant to the Court's consideration of the instant motion."

In *Anderson Nat. Bank* v. *Luckett*, 321 U.S. 233, this Court said:

> The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is involved. If that is preserved, the demands of due process are fulfilled. (p. 246)

The appeals were dismissed on the ground of want of diligence, without any hearing on the question of diligence. On December 26, 1962, petitioner moved for an extension of time; to which respondents made no objection which could not be met by petitioner. Nevertheless, on January 3, 1963, the court entered an order denying the extension.

Although no motion or charge of lack of diligence was before it, the court went further and dismissed the appeals

for want of diligence. The only hearing, if any, on diligence came after the dismissal, and consisted of the receipt by the court of a motion for reconsideration filed by petitioner, to which respondents filed oppositions. To these oppositions, however, the court refused to permit petitioner to reply or to cure the alleged want of diligence. The motion for reconsideration was denied.

In *Morgan* v. *United States*, 304 U.S. 1, 18, this Court said:

> The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one.

The peremptory dismissal of petitioner's appeals is an example of the hostility to private antitrust suits referred to by Circuit Judge Clark in *Eagle-Lion Studios* v. *Loew's*, 248 F. 2d 438, 449, 450, 451, as vitiating the efficacy of private suits, which this Court has recognized as a potent supplementary means of enforcement.

Bruce's Juices v. *American Can Co.*, 330 U.S. 743, 751

United States v. *Borden*, 347 U.S. 514, 518.

The certified copy of the record filed with this petition, is incomplete. It does not contain the following described documents, which the clerk of the court of appeals has declined to furnish, and which petitioner has therefore moved that court to require the clerk to furnish for filing in support of this petition. The motion is pending.

The brief attached to petitioner's motion, filed in the court of appeals on January 17, 1963.

Motion by petitioner for leave to file memorandum in reply to two memorandums submitted by various appellees, dated January 23, 1963.

Memorandum of petitioner in reply (1) to memorandum by appellee Essex Bank and (2) to memorandum of appellees represented by Nutter, McClennen & Fish, dated January 23, 1963.

Letter dated January 26, 1963, to Roger A. Stinchfield, Clerk, signed Jean C. Campopiano.

Copy of letter dated January 31, 1963, to Jean C. Campopiano signed by Dana H. Gallup, Chief Deputy Clerk.

CONCLUSION

It is respectfully submitted that the action of the court of appeals calls for an exercise of this Court's power of supervision, and that for the reasons stated this petition should be granted.

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No. 964

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v.
STANLEY-WARNER CORPORATION *et al.*,
RESPONDENTS.

BRIEF OF ESSEX SAVINGS BANK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF ESSEX SAVINGS BANK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinion Below

While the United States Court of Appeals for the First Circuit did not render an opinion in dismissing petitioner's appeal for want of diligent prosecution, there was an opinion in another aspect of this lengthy litigation, *Lawrence Capitol, Inc. v. Stanley-Warner Corporation, et al.*, 152 F. Supp. 889 (D.C., Mass., 1957), affirmed 254 F.2d 814 (1st Cir., 1958) and there was an opinion by the District Judge in directing the verdict from which plaintiff appealed resulting in the order of dismissal of January 3,

1963, *Lawrence Capitol, Inc. v. Standard-Warner Corporation, et al.* 206 F. Supp. 617 (D.C., Mass., 1962).

Questions Presented for Review

The sole issue in the petition is whether a United States Court of Appeals can dismiss an appeal for violation of the rules and orders of court in a case eight years old and under circumstances in which appellant was given every reasonable opportunity to perfect its appeal but instead chose to ignore both the Court's rules and orders.

Statement of the Case

Petitioner commenced this action on November 3, 1954, naming the Essex Savings Bank as one of a number of defendants. On April 15, 1955, petitioner started another action against many of the same defendants in the 1954 case but not the Essex Savings Bank. The two actions were consolidated for trial.

A separate issue in the cases was tried to a judge resulting in findings against petitioner, 152 F. Supp. 889, and this was affirmed per curiam, 254 F.2d 814. The balance of the case was tried before a jury commencing May 21, 1962. The trial lasted thirteen days and at the end of the trial the District Judge directed a verdict for all defendants, 206 F. Supp. 617, and judgment of dismissal entered June 12, 1962. Petitioner filed its notice of appeal on July 9, 1962 and secured and filed the complete transcript with the Clerk of the United States District Court on August 16, 1962.

Then started a series of inexplicable delays and violations of court rules and orders.

Although the stenographic record was filed on August 16, 1962 with the Clerk of the District Court, petitioner

did not undertake to see to it that the record and transcript were transmitted to the Clerk of the Court of Appeals until October 15, 1962.

Petitioner on October 25, 1962 filed a motion requesting an extension of time to file a statement of points on appeal, a statement of the parts of the record it proposed to print, and its brief and record appendix. The Court of Appeals by order dated October 25, 1962 required that the statement of points and designation of parts of the record to be printed be filed by November 5, 1962 and the brief and record appendix by December 31, 1962.

The statement of points was filed on November 5, 1962, but petitioner at no time filed the designation of parts of the record to be printed. It was apparent, however, that petitioner at all times considered printing part of the record in its record appendix because all motions requested time extension for filing the record appendix. Thus the designation of parts of the record was an essential step to perfect the appeal and by November 5, 1962 petitioner was already in default.

On December 26, 1962, petitioner, apparently overlooking the fact it was already in default, filed a motion to extend the time to file its brief and record appendix until January 31, 1963. Petitioner did not have this motion allowed by December 31, 1962.

When the Clerk's office of the Court of Appeals inquired of petitioner as to the number of pages of its brief and record appendix that had been printed since it received the transcript on August 16, 1962, petitioner shocked both the Court and counsel by filing on January 3, 1963 a hand written motion for leave to file a typewritten brief and record appendix. No affidavit or other substantiation was filed with this motion.

The motion to use typewritten brief and record appendix demonstrated that other than filing the notice of appeal,

transcript and motion to extend time, petitioner in the period from June 12, 1962 until January 3, 1963 had done *absolutely nothing* to perfect its appeal. Its motions misled both the Court and counsel for appellees into thinking that petitioner was diligently submitting material to the printer and that the brief and record appendix were nearing completion.

There was no need for counsel for the appellees to file briefs in opposition to the motion for an extension on January 3, 1963. It was obvious by then that petitioner was not prosecuting the appeal with diligence. The Court of Appeals on the same date dismissed the appeal for want of diligent prosecution.

The Court did, however, stay its mandate until January 24, 1963. In the interim petitioner still did not file its designation of parts of the record to be printed. Instead petitioner sought to file a "brief" of about 30 pages which contained numerous references to the typewritten transcript but none to any record appendix. The "brief" was totally in violation of all requirements of the rules of the Court of Appeals for the First Circuit.

Petitioner was not incapable of taking the proper steps to perfect its appeal. It had already done so in an earlier appeal in this case. 254 F.2d 814. This time petitioner seemed content to fail into default, remain in default, violate court orders and rules, and when the Court called petitioner on its violations, barrage the Court with numerous motions.

Argument

This action has been pending against this respondent for eight years. Petitioner has had two separate trials before two different Federal Judges. Both ruled that petitioner's claims were devoid of merit.

The Essex Savings Bank is a Massachusetts savings bank with depositors, both large and small, numbering over 30,000 in the greater Lawrence, Massachusetts area. This litigation against the bank, so frivolous and without foundation, has been a constant drain on depositor's funds. Litigation must end sometime. Court rules are designed to require a litigant to take certain specific steps on appeal or else end the litigation.

Petitioner had every opportunity to perfect its appeal. Instead it went into default on November 5, 1962 and again on December 31, 1962. There is no reason why respondent should wait around year in and year out, while its witnesses are lost to it, as petitioner patches together an appeal.

Petitioner suggests in its petition that the designation of parts of the record to be printed was not necessary because none of the record was "essential". This is simply nonsensical. The statement of points filed by petitioner, among other things, challenged the District Court's action directing a verdict. The Court of Appeals could not properly rule on this point without the bulk of the testimony before it.

Petitioner also suggests that because respondents did not file briefs in opposition to its motion of December 26, 1962 to extend the time to file its brief and record appendix until January 31, 1963, respondents did not object to the motion. This respondent assumed on December 26, 1962 that by that time petitioner had printed the bulk of the record. When petitioner filed its motion on January 3, 1963 to use a typewritten record, it was apparent to this respondent, as it was to the Court of Appeals, that petitioner was simply dragging this interminable litigation further out.

The petition for a writ of certiorari relates to a purely intra-circuit affair. Certainly this Court should not be burdened with review of cases where an unsuccessful litigant was eminently successful in violating court rules and

orders. To review this case would make court rules meaningless. If every litigant who is defaulted or whose action is dismissed can have review of the Court's action in this court, then there will be little certainty to court rules. And if the action were reviewed, what standard instead of court rules shall be used? Should the Court permit violations of the rules and orders of a court as long as the appellant does not dilly-dally more than the 80 days that petitioner says elapsed here?

Conclusion

For the foregoing reasons, respondent Essex Savings Bank respectfully requests that the petitioner be denied.

ESSEX SAVINGS BANK

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENTS (OTHER THAN ESSEX SAVINGS BANK) IN OPPOSITION.

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STANLEY-WARNER CORPORATION ET ALS.,
Respondents.

BRIEF FOR RESPONDENTS (OTHER THAN ESSEX SAVINGS BANK) IN OPPOSITION.

Questions Presented for Review.

(1) Whether a Court of Appeals is not fully warranted in dismissing an appeal for lack of diligent prosecution where petitioner, after the expiration of a period of over four months, had not substantially advanced preparation of its brief or record-appendix, nor even filed a timely motion for further extension; sought to have the court below review alleged errors in exclusion of evidence and direction of verdict in an antitrust case involving 1,500 pages of testimony on a proposed record-appendix of 6 transcript pages; and deliberately failed, for nearly two months, to file the requisite designation of record.

(2) Whether the discretionary jurisdiction of this Court should be exercised in favor of a party whose petition as-

serts its consistent position to be a contention which is not only patently captious but flatly contradicted by a number of its pleadings below.

Statement.[1]

The Underlying Case.

As background for the issue raised in the petition, it should be noted that the litigation involved consists of two motion-picture treble-damage complaints against various distributors and numerous local (Lawrence, Massachusetts) individuals and corporations filed in November, 1954, and April, 1955. In 1957 the validity of a 1952 general release granted by the petitioner, for very substantial consideration, was upheld, against contentions that it had been obtained by fraud and duress (*Lawrence Capitol, Inc.*, v. *Stanley-Warner Corporation*, 152 F. Supp. 889 (D. Mass. 1957); aff'd *per curiam*, 254 F. 2d 814 (1st Cir. 1958)), as a result of which the trial in the District Court (from which the appeal below was taken) involved a maximum damage period of some two years. Following twelve days of trial in which the petitioner's chief executive officer and stockholder (152 F. Supp., *supra*, at p. 890; R. 13, 15) was the principal witness on the merits (*cf.* P. 6), District Judge Caffrey directed a verdict for all defendants, on a variety of equally dispositive grounds, including want of sufficient evidence of conspiracy, lack of proof of proximate cause of any damage, inadequate evidence of the amount of damages and the binding effect of ultimate facts determined adversely to petitioner in the prior litigation. *Lawrence Capitol, Inc.*, v. *Stanley-Warner Corp.*, 206 F. Supp. 615 (D. Mass. 1962).

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[1] References are to P. —Petition for Writ of Certiorari; R. —Certified Copy of Proceedings Filed by Petitioner.

THE PETITIONER'S CONDUCT OF ITS APPEAL.

In the interests of brevity, the facts relating to the following significant aspects of petitioner's conduct of its appeal below are set out in the Argument, *infra*:

Petitioner secured ample time for preparation of its appeal (pp. 4-5).

Failed to furnish designation of record (pp. 5-6).

Failed to timely file brief and record-appendix, or any request for extension of time (p. 6).

Failed to file timely motion to recast in its entirety the form of petitioner's appeal (pp. 6-7).

Attempted to conduct appeal with completely inadequate record-appendix (p. 7).

Argument.

The issue raised by the petition was correctly decided below. The basis of dismissal of petitioner's appeal to the First Circuit was not non-compliance with a "procedural formality" (P. 4), but an almost reckless disregard by petitioner's attorneys, including the principal owner of the petitioner, of the rules binding on, and responsibilities of, an appellant.

Petitioner's explanation of the sole aspect of its conduct below which its application discusses is that a designation of the record below was not furnished as required by the rules of the First Circuit, because petitioner did not deem any record essential for the consideration of the Court of Appeals. This suggestion appears to be adopted solely for purposes of the petition, and to be contradicted by the numerous pleadings of the petitioner below. The petitioner is undeserving of any exercise of this Court's discretionary jurisdiction.

I.

The Dismissal of the Appeal was Clearly Warranted by Petitioner's Persistent Disregard of its Responsibilities as an Appellant.

Contrary to petitioner's suggestion (P. 2, 4, 7), its appeal was *not* dismissed solely because of a failure to furnish appellees with a designation of the record proposed to be printed.[2] Rather, the court below had before it, in passing on the dismissal (and the subsequent motion for reconsideration of the dismissal), the actions of petitioner here described which, severally and *in toto*, constitute a disregard of the obligations of an appellant so complete as to evince a casual contempt for the whole process of appeal.

Preliminarily it should be noted that both of the counsel for petitioner, who appear in the proceedings below (R. 2, 11, 13), were familiar with the rules and requirements of appeals in the First Circuit by reason of their handling of the unsuccessful prior appeal of the plaintiff (254 F. 2d 814 (1st Cir. 1958)). Moreover, if material, it may be observed that there is no aspect whatsoever in this case of a party losing rights by reason of the defaults of his attorneys for which he should not be fairly charged, because the sole owner of the petitioner is one of the attorneys of record (R. 13, 15).

(1) The claim of appeal was filed on July 6, 1962 (P. 3); the stenographic transcript was filed (with petitioner's copy available to it) by August 16, 1962 (R. 3). Pursuant to extension secured from the District Court (F.R.C.P. 73(g)) the petitioner's time for docketing the case in the Court of Appeals was extended until October 15, 1962 (R. 1, 16). This extension alone provided the petitioner with

[2] As pointed out (II, *infra*), even this one ground of the action of the court below, which petitioner does acknowledge, has been seriously misstated in its petition.

seven weeks in which to work on the transcript in preparation of its brief and record-appendix. Upon the docketing of the case in the Court of Appeals the petitioner, who would have, under the rules, thirty days thereafter to file its brief and record-appendix, moved for forty more (or a total of seventy additional) days for this purpose (R. 3). On such motion the court below granted thirty-two additional days, giving the petitioner until December 31, 1962 (R. 6), to file its brief and record-appendix. As a result of the foregoing steps the petitioner obtained somewhat over four months (or from August 16 to December 31) to study the transcript, select and designate its record-appendix and write its brief. This was a more than ample period of time, in view of the fact that the cases had been pending since 1954-1955, with many of the questions raised on appeal already having been extensively briefed and developed over that period (*cf.* R. 28), and in view of the further fact that the bulk of the testimony below came from the petitioner's own chief executive officer (R. 13).

Notwithstanding, the motions filed by petitioner on December 26, 1962, and January 2, 1963, clearly revealed to the court below that petitioner had not at that late date even selected, much less commenced the printing of, the record materials to constitute its appendix or had a brief in any state near completion.

(2) As set out in the petition (P. 3), Rule 23 of the rules of the First Circuit (as in effect at that time) requires an appellant to designate, within ten days of the docketing of his case, the points which he intends to argue and the portions of the record which he proposes to print. Here, although petitioner filed its statement of points on November 5, 1962 (R. 6), neither then nor at any time thereafter did it file a designation.

The implications of dilatoriness from the foregoing action by petitioner went beyond the non-compliance with the

rule, important and essential as that rule may be. Not only had petitioner omitted, from November 5, until December 31, to file the designation, but, on December 31, 1962, petitioner was not sufficiently advanced in the preparation of its necessary appeal documents to be able to then and there file the designation, but, rather, needed (and sought) a still further extension for the purpose (R. 17).

(3) Petitioner not only proceeded in so laggardly a fashion that it was nowhere near completing a brief and record-appendix in the four months' time available ((1), *supra*) but when, in view of such lack of diligence, it became obvious to petitioner that it would not be ready by December 31, 1962, petitioner nevertheless delayed until far too late to seek any necessary extension of time. With its time expiring on the 31st of December, petitioner delayed filing any motion for an extension until the 26th of the month (R. 7). Under the rules of the court below (Appendix, p. 11, *infra*) any such motion requires a return day three days later (Sundays and holidays excluded). On petitioner's motion, filed on December 26, 1962, such a return day (*i.e.*, the first day the court could consider the matter) would have been January 2, 1963, or after petitioner's already extended period of time *had already expired.*

Once again petitioner thus had evinced a disregard, not only of the rules, but of its own self-interest; having waited until so late a date, petitioner was in no position to protect itself against the possibility that its motion would be denied or even granted only in limited part. This conduct shows such little concern over the fate of its appeal that a conclusion of want of diligence is virtually dictated.

(4) Petitioner appears guilty of a lack of candor and good faith, as well as diligence, in its last-moment efforts to obtain approval to recast its appeal papers entirely, from the usual printed record and briefs, to a typewritten

format. Although, on the statement made in support of this motion by petitioner (filed on January 2, 1963), the necessity to take this step must have been known to it by early November, 1962 (R. 16, 17), petitioner failed to initiate action to secure such relief at that time. When, on December 26, 1962, petitioner moved for its extension, described above, its intentions in regard to use of typewritten record and brief were still not revealed to the Court of Appeals, for the motion was consistent solely with proceeding in the usual form (R. 7). When, on January 2, 1963, petitioner did ask for leave to proceed on typewritten papers, its action constituted, for the court below, a further demonstration of petitioner's disregard, not only of the rules, but of considerations of candor and straightforward dealing with the court.

(5) The final demonstration of petitioner's lack of serious intendment with respect to its appeal was furnished by the brief and "record-appendix" which petitioner filed in the court below with its motion for reconsideration.

The "brief" argued, in a number of instances (R. 23), alleged errors in the exclusion of evidence, as well as the basic contention that the District Court should not have directed a verdict because petitioner had adduced a prima-facie case of conspiracy. In sum, petitioner was raising an argument which, if it were to claim any serious consideration from an appellate tribunal, would clearly require frequent and copious resort to the underlying testimony. But, in support of such a brief, petitioner proposed to print, as a record-appendix, only some *six* pages of transcript (P. 8). It simply cannot be seriously maintained that this method of proceeding represents a diligently prosecuted appeal.[8]

[8] Since, on this ground alone, the court below would have dismissed the appeal eventually (*Gallarelli* v. *United States*, 248 F. 2d 539, 540 (1st Cir. 1957); *Shankman* v. *Aspinook Corp.*, 215 F.

In short, the action of the court below rested, not upon the sole (and misstated (II, *infra*)) ground referred to in the petition, but upon a series of actions evidencing a disregard of petitioner's self-interest and of the responsibilities of an appellant, the sum total of which constituted an abuse of the appellate process.

II.

THIS COURT'S DISCRETIONARY JURISDICTION SHOULD NOT BE EXERCISED IN FAVOR OF A PARTY WHICH DELIBERATELY STATES IN ITS PETITION A CONTENTION FLATLY CONTRADICTED BY ITS WRITTEN PLEADINGS BELOW.

As described above, the petition asserts, in respect of the one ground of the lower court's action which is acknowledged and dealt with therein, that petitioner was never obligated to furnish a designation of the record "because it has not deemed any part of the record so 'essential'" (P. 4; *cf.* P. 8).

(1) As already suggested (I (5), above), the proposition that no record (printed or typewritten) is essential for appellate consideration of an antitrust case involving 1,500 pages of transcript and 190 exhibits (P. 6) on an appeal alleging error as to numerous evidential rulings and asserting that evidence made the granting of a directed verdict error is clearly captious and justifies the action of the Court of Appeals.

(2) But this particular contention also constitutes a separate and distinct reason why the discretionary writ prayed for should not be granted, because it is flatly contradicted by other action of the petitioner below:

2d 902, 904 (1st Cir. 1954)), its action in doing so at this stage, in the context of the numerous other defaults of petitioner, can present no substantial question of departure from the accepted course of proceeding.

(a) On October 25, 1962, petitioner filed a motion expressly seeking an extension to November 23, 1962, of "the time for furnishing to the appellees and the Clerk of this Court, a statement of the parts of the record which *it proposes to print in the record appendix to its brief* . . ." (R. 4-5).

(b) On October 25, 1962, petitioner also moved "that the time for filing the consolidated brief for the Appellant with consolidated *record appendix* be enlarged . . ." (R. 3).

(c) Petitioner's motion of December 26, 1962, for a further extension of time was expressly entitled "Motion for Extension of Time to File Consolidated *Record Appendix* and Consolidated Brief" (R. 7).

(d) The motion filed by petitioner on January 2, 1963, is expressly entitled "motion of appellant to type *record appendix*, brief and other documents, etc." (R. 9).

These statements in petitioner's own pleadings (emphasis added) in the court below show clearly that at all times petitioner intended to file a record-appendix. Therefore its statement in the petition (P. 2, 4, 8) that it has not deemed any part of the record essential for such printing misstates its own previous record positions, and constitutes, at best, a careless and, at worst, a deliberate misrepresentation to this Court. In any event, this conduct, apart from all other considerations, disentitles the petitioner to any benefit of this Court's discretionary and selectively exercised powers of review.

Wherefore respondents urge that the petition for writ of certiorari should be denied.

Respectfully submitted,

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TCF Film Corporation,
Loew's Incorporated,
Paramount Film Distributing Corporation,
Paramount Pictures Corporation,
RKO Pictures, Inc.,
Columbia Pictures Corporation,
Universal Film Exchanges, Inc.,
United Artists Corporation,
Republic Pictures Corporation,
Massachusetts Amusement Corporation,
Stanley-Warner Corporation,
Warner Bros. Theatres, Inc.,
Warner Bros. Circuit Management Corporation,
Stanley-Warner Circuit Management Corporation,
Warner Bros. Pictures, Inc.,
Warner Bros. Pictures Distributing Corporation.

Appendix.

RULES OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT IN EFFECT AT TIMES INVOLVED IN THIS CASE.

Rule 36.

MOTIONS.

(1) FORM—FILING. All motions to the court shall be in typewritten form, except those which are required to be printed under paragraph (3) of this rule, and shall contain a brief statement of the facts and the grounds of the motion; and may be accompanied by a memorandum in support thereof. Four copies of the motion and of each accompanying document shall be filed with the clerk. If the motion is assented to or is joint, the clerk will submit it forthwith to the court for consideration. If the motion is not assented to or is not joint, it must be accompanied by a proof of service upon adverse counsel of (a) a copy of the motion, (b) a copy of any accompanying document, and (c) a copy of the proof of service itself, and such proof shall recite the manner and date of service. Thereby the adverse counsel may determine the return day which is automatic under the next paragraph.

(2) RETURN DAY—OPPOSITION—SUBMISSION. The return day of the motion shall be the third day (sixth day in cases from Puerto Rico) after the date of service unless the movant serves and files a notice fixing a later return day. (Sundays and holidays shall be excluded in the calculation of time under this rule.) The opposing counsel may, before 10:30 o'clock in the morning of the return day or within any extension of time made by the court or a judge thereof, file four copies of a memorandum in opposition to the motion, with proof of service; the motion will then stand submitted, unless oral argument is directed by the court.